

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Appellants: H. ANDO et al. Confirmation No. 8770
Serial No.: 10/608,335
Filed: June 30, 2003
For: LEARNING CONDITION JUDGING PROGRAM AND USER
CONDITION JUDGING SYTEM
Group: 3713
Examiner: K. Frisby

REPLY BRIEF

MS Appeal Briefs - Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

November 16, 2009

Sir:

This Reply Brief is respectfully submitted in response to the Examiner's Answer mailed September 15, 2009, and does not include any new or non-admitted amendment, or any new or non-admitted affidavit or other evidence, in compliance with 37 C.F.R. 41.41. Entry and consideration of this Reply Brief are requested.

I. STATUS OF CLAIMS

The statement of the status of the claims in the Appeal Brief is correct, as the Examiner affirmed in the Examiner's Answer.

II. GROUND'S OF REJECTION TO BE REVIEWED ON APPEAL

The statement of the grounds of rejection to be reviewed on appeal contained in the Appeal Brief is correct, as the Examiner affirmed in the Examiner's Answer.

III. ARGUMENTS

Appellants make the following response to various new points of arguments made by the Examiner.

A. The Examiner alleges that Zaltman teaches "judging, whether or not a degree of concentration of said user to said learning program is higher than a predetermined degree by using said measurement information of said blood flow rate and said attention information to determine that the user is in concentration time" as recited in independent claims 1 and 13. Appellants disagree.

In response to Appellants' arguments that Zaltman does not teach this feature, the Examiner asserts that in Zaltman, when there is an increased processing made, a determination can be made because if any increase is measured, then it is determined that the degree of concentration of the user to the learning program is higher than a predetermined degree. The Examiner further asserts that "predetermined degree" is considered as a baseline when

given its broadest reasonable interpretation, and any determination of an increase has to come from a baseline. (See, page 18, lines 7-14).

In response to the Examiner, Appellants submit that while it is understood that claims are to be given their broadest reasonable interpretation, the Examiner is reminded that all words in a claim must be considered in judging the patentability of that claim against the prior art. *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). In the present invention, a determination is made as to whether or not a degree of concentration of the user to the learning program is higher than a predetermined degree by using the measurement information of the blood flow rate and the attention information to determine that the user is in concentration time. There is no teaching or suggestion in Zaltman of using the measurement information of the blood flow rate and the attention information to make the determination as to whether a degree of concentration of the user is higher than a predetermined degree, and the Examiner has not provided any support for the assertion that Zaltman teaches using the measurement information of the blood flow rate and the attention information, in the manner claimed. Therefore, the Examiner has not considered all the words in the limitations of claims 1 and 13.

As described in the cited text, Zaltman merely describes where an increase in the processing within a brain region results in a proportional increase in the concentration of oxygen and other blood-born metabolites accessible to that brain region. Thus, measuring the concentration of blood flow to the brain while an individual performs an isolated cognitive task provides a means of measuring the relative processing contribution of each

subregion to the task. This is not the same as the present invention. More specifically, measuring the relative processing contribution of each subregion to the task by measuring an increase in the processing within a brain region, as provided in Zaltman, is not the same as using the measurement information of the blood flow rate and the attention information to make a determination as to whether a degree of concentration of the user is higher than a predetermined degree.

Therefore, the combination of Obrador, Freer, Ho, Atsushi and Zaltman fails to teach or suggest "judging, when an event occurs within the predetermined window, when a facial image of the user is recognized, or when said audio information includes predetermined audio information, whether or not a degree of concentration of said user to said learning program is higher than a predetermined degree by using said measurement information of said blood flow rate and said attention information to determine that the user is in concentration time" as recited in independent claims 1 and 13.

B. The Examiner alleges that Freer teaches "recording, when said degree of concentration of said user to said learning program is higher than said predetermined degree" as recited in independent claims 1 and 13. Appellants disagree.

In response to Appellants' arguments that Freer does not teach this feature, the Examiner concedes that "Freer does not explicitly state the claimed limitation." However, the Examiner provides various citations,

thereby appearing to rely upon implicit disclosure that Freer teaches the claimed feature. (See, page 19, lines 5-2).

In response to the Examiner, Appellants again remind the Examiner that all words in a claim must be considered in judging the patentability of that claim against the prior art. Appellants submit that the Examiner's interpretation of the claimed feature fails to consider the claimed condition of recording, namely recording data when the degree of concentration of the user to the learning program is higher than a predetermined degree.

As described in column 13, lines 1-8, Freer merely discloses where an apparatus includes a recording device in the form of computer memory and storage devices. For each of the educational exercises, the computer measures and saves to the recording device the performance data of individual users including score, duration of play, and average focus and cognitive processing levels, and the computer accumulates and saves to the recording device the cumulative time on-task of individual users. Unlike the present invention, Freer does not teach or suggest recording data when the degree of concentration of the user to the learning program is higher than the predetermined degree. To the contrary, Freer appears to automatically record data without any conditions for recording. This is not the same as the present invention.

To support the new points of argument, the Examiner cites: Figs. 16 and 17 and the accompanying text; columns 1-20; column 13, lines 13-19; and column 13, lines 46-50. However, neither the cited text nor any other portion of Freer teaches or suggests, whether expressly or impliedly, the features of the present invention. More specifically, the cited text does not

disclose recording data when the degree of concentration of the user to the learning program is higher than a predetermined degree, as in the present invention.

Therefore, the combination of Obrador, Freer, Ho, Atsushi and Zaltman fails to teach or suggest "recording, when said degree of concentration of said user to said learning program is higher than said predetermined degree, said degree of concentration of the user and said attention information of the user with said progress of said learning program in said recording means" as recited in independent claims 1 and 13.

C. The Examiner alleges that Freer teaches "displaying, when said degree of concentration of said user to said learning program is not higher than said predetermined degree, information that the user is not in concentration time" as recited in claims 1 and 13. Appellants disagree.

In response to Appellants' arguments that Freer does not teach this feature, the Examiner asserts that "Freer teaches in column 16, lines 28-32 that displaying "Focus to continue" clearly shows the claimed invention because that phrase is used when there is a detected loss of focus." However, the Examiner is again reminded all words in a claim must be considered in judging the patentability of that claim against the prior art.

The present invention provides a step of displaying information that the user is not in concentration time when the degree of concentration of the user to the learning program is not higher than the predetermined degree. Freer teaches displaying "Focus to continue", but the manner of detecting a loss of focus in Freer is not the same as detecting when the degree of concentration

of the user is not higher than a predetermined degree, as in the present invention.

As described in the cited text, Freer teaches a procedure where a matcher demands that a user maintain focus to begin play and sustain focus to continue play. As further described in column 16, lines 32-40, a detected loss of focus causes the screen to display "Focus to continue," while the words "Focus to continue" can be heard through the computer's sound card and speakers. In the beginner level of the matcher procedure, the user hears two distinct tones emanating from the computer's speaker. If the tones match, the user depresses the space bar. No response is required for a non-match. As described in column 16, lines 25-27, Freer teaches where the goal of this procedure is for the user to maintain optimum attention while processing at least incoming auditory data and inputting responses to the computer. Contrary to the Examiner's assertions, there is no teaching or suggestion in Freer of where "Focus to continue" is displayed when the degree of concentration of the user to the learning program is not higher than a predetermined degree. Therefore, Freer is not the same as the present invention.

Therefore, the combination of Obrador, Freer, Ho, Atsushi and Zaltman fails to teach or suggest "displaying, when said degree of concentration of said user to said learning program is not higher than said predetermined degree, information that the user is not in concentration time" as recited in independent claims 1 and 13.

D. In response to Appellants' argument that the Examiner's conclusion of obviousness is based on improper hindsight reasoning, the Examiner asserts that "it must be recognized that any judgment of obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning", citing *In re McLaughlin* 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971). Accordingly, it appears that the Examiner is intent on using "hindsight reconstruction" to meet the limitations of Appellants' invention by using a multiplicity of references, combined in an arbitrary manner.

However, in response to the Examiner, Appellants submit, as held in *In re McLaughlin*, that reconstruction based on hindsight reasoning is improper when it includes knowledge gleaned only from applicant's disclosure. As discussed at length on pages 15-21 of the Appeal Brief, the Examiner has arbitrarily combined the cited references, while relying upon improper hindsight reasoning. The Examiner's rejection lacks sufficient motivation for combining Obrador, Freer, Ho, Atsushi and Zaltman, and the Examiner has failed to show a proper *prima facie* case of obviousness. Therefore, the Examiner's rejection is improper.

IV. SUMMARY

For the foregoing reasons, Appellants respectfully submit that the Examiner's final rejections of claims 1, 3, 7, 9-14, 16 and 17 are not properly founded in law, and Appellants respectfully request that the Board of Patent Appeals and Interferences so find and reverse the Examiner's final rejections.

To the extent necessary, Appellants petition for an extension of time under 37 CFR §1.136. Please charge any shortage in the fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account No. 50-4888 (Case No. 500.42880X00) and please credit any excess fees to such Deposit Account.

Respectfully submitted,

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